No. 182. 27

FILED
FEB 24 1899
JAMES H. McKENNEY,
Clerk.

Reply Brief of Choate & Wilson for

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Feb. 24, 1899.

No. 182.

GEORGE L. WHITMAN,

Petitioner,

vs.

THE NATIONAL BANK OF OXFORD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MEMORANDUM IN REPLY ON BEHALF OF PETITIONER.

WILLIAM G. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States,

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS—FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN,
Petitioner,
VERSUS
THE NATIONAL BANK OF OXFORD.

No. 182.

Memorandum for Petitioner in Reply.

Respondent's argument rests upon the Kansas Constitution. It confesses the necessity for a declaration of general individual liability to sustain an action outside of the State of Kansas, and, finding it nowhere in the statutes, is driven to claim that the Constitution is self-executing, and therefore is in effect a statute. This Court is asked to reverse its well-established position in order to give effect to the argument, and to overrule *Groves vs. Slaughter*, 15 Pet., 449, which has been followed by Federal and State Courts for more than half a century. The point made by the Massachusetts Court in *Hancock National Bank vs. Ellis*, 51 N. E. Rep., 207, that the question of the extra-territorial effect of the Kansas statute could not properly come before the Kansas Court for authoritative decision, is in accord with petitioner's argument and should lead logically to the conclusion that the language in *Howell vs. Manglesdorf* cannot speak with authority, *not*, that it should be authoritative for that very reason.

There is nothing in the language of the Kansas Constitution which necessarily indicates an intention that the individual liability contemplated was to be one enforceable everywhere. Any form of liability extending to an amount equal to the stock held would satisfy the constitutional requirement.

The Kansas Legislature in carrying out the mandate of the Kansas Constitution have interpreted it as being satisfied by special remedies available in that State.

Nothing in the statutes themselves indicates any contemplation of stockholders' liabilities without the State.

The theory of the respondent that upon the petitioner's construction of the Kansas statutes there would not be a compliance with the Kansas Constitution is not well founded. Subjecting the stockholder and his property within the limits of Kansas to execution, and action in aid of the execution is a sufficient compliance with the Constitution. No stranger or citizen of another State reading the Kansas statutes would imagine himself liable out of Kansas, and as to the corporations, to which the Kansas statute applies, it may well have been the policy of the State to tempt foreign capital into the State by this restricted form of liability.

The marked contrast between the language of an earlier statute which was before the Kansas Court in *Grund vs. Tucker*, 5 Kan., 70, and the language here in question, shows a deliberate intention of the Kansas Legislature to treat the two cases differently; yet respondent argues that the two enactments should be deemed identical in meaning and result.

The language of the statute considered in *Grund vs. Tucker* was: "*The stockholders* of any company organized under this act *shall*, to the amount of stock by them held, *be jointly and severally liable* for all *debts or responsibilities* of the company."

The language of the statute here in question is: "If any execution shall have been issued against the property or effects of a corporation, * * * and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned. * * * *Or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.*"

The language of the Kansas Constitution is: "Dues from corporations shall be secured by individual liability of the stockholders," &c. "Dues" are the original debts of the corporation, not *judgments subsequently recovered* after such debts have become "due." Such judgments may or may not be founded on such debts, and certainly include more—as, for instance, costs, which become part of judgments. Moreover, many judgments recovered by de-

fault or carelessly suffered to be entered on insufficient grounds or without the addition of valid defenses are in no sense identical with debts.

It would be unreasonable to interpret the Constitution as intended to provide for anything beyond what are strictly the debts or "dues" of the corporation.

Not one of the decisions attributing extra-territorial force to this Kansas statute rests upon reason. The cases rest upon the assumed authority of *Howell vs. Manglesdorf*, or the erroneous interpretation of that case, as an actual decision, is their principal foundation.

If the question now arose for the first time, and the case of *Howell vs. Manglesdorf* had never been, it is not credible that the Court would find any sufficient authority for supporting this action.

The National Banking law is cited as a conspicuous example of a declaration of general individual liability. There is no similitude between the provisions of the National Banking law (U. S. Rev. Stats., Secs. 5151, 5152) and the Kansas statute. The language of the banking law is such as unequivocally to denote individual and personal liability. Section 5151 uses the words, "held individually responsible," and Section 5152, which excepts executors, trustees, &c., used the language "shall not be personally subject to any liability as stockholder, but the estate, &c., shall be liable." This amounts to a clear declaration of liability such as we contend is necessary to produce the result claimed by the respondent.

In the case of *Dennick vs. Railroad Co.* the real question was whether, under the terms of the New Jersey statute, the administrator referred to might be an administrator residing in another State; and, as an administrator under the laws of New Jersey could live anywhere and was not restricted to residence within the State, it would seem pretty clear that there was nothing in the statute making an exception in the case of the administrator who brought the action.

The point in regard to the Statute of Frauds is misapprehended. The Kansas Constitution does not declare that the stockholder of a Kansas corporation *contracts* to pay judgments recovered against

the corporation. It simply provides that judgments from corporations *shall be secured* by individual liability of the stockholders.

The Kansas statute does not declare that the stockholder contracts to pay debts of the corporation or judgments against the corporation. It simply provides that certain proceedings may be taken against the stockholder.

The complaint herein does not declare that the stockholder has made any *contract*. It simply avers the language of the Kansas Constitution and the language of the Kansas statute. Therefore, there was nothing in the complaint asserting a contract, and, therefore, nothing to call forth any plea of the Statute of Frauds.

The respondent *argues* that, by reason of the *dictum* in *Howell vs. Manglesdorf*, petitioner is to be deemed to be liable *upon contract or as upon contract*.

The petitioner argues that this cannot be so, because the Kansas statute declares no contract, while the Kansas Statute of Frauds prohibits an action upon a contract to pay the debt of another, unless such contract be in writing and signed by the party to be charged—and the Kansas Statute of Frauds is not to be presumed to be displaced and nullified by the statute now in question, upon a mere inference, and in the absence of clear evidence of an intention to so displace and nullify it.

This is not a question of pleading. It is merely meeting an argument as to an inferred intent of the special statute, by a counter-argument negativing the inference of that intent.

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